Filed 6/11/19 Wendland v. OneWest Bank, FSB CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Calaveras)

BRUNO WENDLAND et al.,	C070644
Plaintiffs and Appellants,	(Super. Ct. No. 10CV36664)
v.	ORDER MODIFIFYING OPINION AND DENYING PETITION FOR REHEARING
ONEWEST BANK, FSB, et al.,	
Defendants and Respondents.	[NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the nonpublished opinion filed herein on May 15, 2019, be modified as follows:

1. On page 14, first sentence of the second full paragraph, delete "not for wrongful foreclosure as in Yvanova" and add "whereas in *Yvanova*, both reviewing courts focused on a single aspect of a potential claim for wrongful foreclosure, standing."

The paragraph shall now read:

Additionally, the instant case involves a claim to quiet title, whereas in *Yvanova*, both reviewing courts focused on a single aspect of a potential claim for wrongful foreclosure, standing.

2. On page 14, the second full paragraph, after the first sentence ending "not for wrongful foreclosure as in *Yvanova*," add as footnote 8 the following footnote, which will require renumbering of all subsequent footnotes:

> **8** In *Yvanova*, the trial court sustained a demurrer to a cause of action to quiet title. (*Yvanova, supra,* 62 Cal.4th at pp. 925-926.) But on review, both the Court of Appeal and our high court focused on the potential to amend to state a cause of action for wrongful disclosure. The Supreme Court wrote the following about the Court of Appeal's decision and the procedural posture of the case on appeal: "The pleaded cause of action for quiet title failed fatally, the [C]ourt [of Appeal] held, because plaintiff did not allege she had tendered payment of her debt. The court went on to discuss the question, on which it had sought and received briefing, of whether plaintiff could, on the facts alleged, amend her complaint to plead a cause of action for wrongful foreclosure. [¶] On the wrongful foreclosure question, the Court of Appeal concluded leave to amend was not warranted" because the plaintiff lacked standing. (*Yvanova*, at p. 926.)

3. On page 12, the last paragraph, delete the two record citations to the oral argument recording.

This modification does not change the judgment. Plaintiffs' petition for rehearing is denied.

FOR THE COURT:

/s/
RAYE, P. J.

/s/
BUTZ, J.

/s/
MURRAY, J.

Filed 5/15/19 Wendland v. OneWest Bank, FSB CA3 (unmodified opinion)

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Calaveras)

BRUNO WENDLAND et al., Plaintiff and Respondent, v. ONEWEST BANK, FSB et al., Defendant and Appellant.	C070644 (Super. Ct. No. 10CV36664)

Plaintiffs Bruno and Erika Wendland, homeowners who lost their home in foreclosure proceedings, appeal from the trial court's dismissal of one of the defendants, OneWest Bank, FSB (OneWest), from their action seeking to quiet title and injunctive relief following an order sustaining OneWest's demurrer. After five successive demurrers with leave to amend, the trial court ruled that plaintiffs' failure to tender precluded their claims to quiet title and for injunctive relief against OneWest.

On appeal, plaintiffs contend in their most recent theory that the trustee's sale was void because neither the foreclosing trustee nor OneWest had any "documented interest" in the note and deed of trust at the time of the trustee's sale because their deed of trust was assigned to and recorded by OneWest after the trustee's sale. Thus, even though OneWest obtained a beneficial interest by way of the late assignment months before plaintiffs filed this action, plaintiffs assert they were not required to tender the remaining balance of their loan in order to quiet title because the trustee sale was void.

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Original Complaint and Demurrer

On May 10, 2010, plaintiffs filed their original complaint against the following defendants: plaintiffs' originating lender, IndyMac Bank, F.S.B. (IndyMac); OneWest, the successor in interest to IndyMac; plaintiffs' mortgage broker, Tom Pfifer, on behalf of Quality Funding; and the foreclosure processor, Quality Loan Service Corporation (Quality Loan) (collectively, defendants). The complaint alleged that on January 5, 2007, plaintiffs applied for and received a loan in the amount of $772,000 pursuant to a note and deed of trust to make improvements on their real property.[1] Plaintiffs alleged that at the time of the loan origination, their only income was $2,000 per month in Social Security payments. Plaintiffs further alleged that they "were led to believe at the time of securing the loan that if they had problems making the payments because the house was not sold, a modification of the loan would occur and accommodations would be made." The complaint further alleged that by 2009, plaintiffs were in default on the loan and sought loan modification. However, the proposed loan modification was beyond plaintiffs' ability to pay.

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[1] In later versions of their complaint, plaintiffs added the allegation that their loan was secured by their interest in the real property.

On July 15, 2009, OneWest filed a notice of default and election to sell, with an amount in arrears of $36,573.13. On October 19, 2009, a notice of trustee's sale was filed, "alleging the unpaid balance of $820,720.59, which foreclosure was being processed by [Quality Loan]." On December 1, 2009, a trustee's sale occurred, conveying the property to OneWest, and a trustee's deed upon sale was recorded. On November 19, 2010, plaintiffs were served with a notice to vacate. Plaintiffs alleged that they did not file any objection during the foreclosure process "because of a lack of finances" and because plaintiffs had invested all of their money into improving the property. Plaintiffs further alleged that at all times during the life of the loan, plaintiffs' income was less than the monthly mortgage payment required by the size of the loan. Based on these factual allegations, plaintiffs alleged causes of action against defendants for breach of Financial Code section 4973, subdivision (f)(1), fraud, fraudulent conveyance, conspiracy, quiet title, and injunctive relief.

On August 2, 2010, OneWest demurred to the original complaint, which the trial court sustained as to all causes of action with leave to amend.

First Amended Complaint and Demurrer

On September 27, 2010, plaintiffs filed their first amended complaint, which named OneWest as a defendant only as to plaintiffs' cause of action to quiet title and for injunctive relief. Plaintiffs added to their quiet title cause of action "grounds for quieting title": "That the Assignment of Deed of Trust was *recorded* after the Preliminary Injunction and Permanent Injunction prohibiting [OneWest] from taking any action which would deny [p]laintiffs their right to the real property described herein."[2] (Italics

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[2] There is no indication in the record that there was ever a preliminary injunction in effect as plaintiffs contend in this paragraph. The record shows that plaintiffs filed a motion for a preliminary injunction on October 14, 2010, nearly 10 months after the foreclosure sale. However, it does not appear that an injunction was issued. Plaintiffs removed this allegation from all subsequent versions of the complaint.

added.) In all other respects, the complaint remained the same. OneWest demurred a second time, and the trial court again sustained the demurrer with leave to amend. This time, the court attached a written ruling explaining that "[p]laintiffs have not alleged tender of the indebtedness nor properly asserted a cause of action against [OneWest] for which tender is not required."

Second Amended Complaint and Demurrer

On January 19, 2011, plaintiffs filed their second amended complaint (SAC). This time, plaintiffs expanded their factual allegations to allege that, at the time the deed of trust was executed, IndyMac did not reasonably believe that plaintiffs "could collectively make the scheduled payments based on their current and expected income, current obligations, employment status and other financial resources, other than [plaintiffs'] equity in the dwelling that secures repayment of the loan; which loan had a maximum interest rate of 12.950%, and which [plaintiffs'] loan payments exceeded 55% of [p]laintiffs' monthly gross income as verified by the credit application, [plaintiffs'] financial statement, a credit report, financial information provided to the person originating the loan by or on behalf of the consumer, or any other reasonable means."

The SAC still sought to quiet title and injunctive relief against OneWest. (Plaintiffs added the following "grounds for quieting title": (1) IndyMac was the "owner of record" on December 1, 2009, when the trustee's sale occurred and thus OneWest did not have the authority to record the notice of default or conduct the trustee's sale and OneWest did not become the "assignee of record" until February 25, 2010;[3] and (2) at the

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[3] We note that, in its pleadings submitted to the trial court, OneWest submitted a declaration explaining that on March 19, 2009, it purchased various IndyMac assets from a Federal Deposit Insurance Corporation (FDIC) administered receivership, including the note for plaintiffs' loan and was therefore the legal holder of the note prior to the issuance of the notice of default. The declarant cited three business records reflecting this purchase, "a Master Purchase Agreement," "a Loan Sale Agreement," and a "Servicing Business Asset Purchase Agreement," none of which were attached to the declaration.

time OneWest purchased the loan, it knew or should have known that the loan was procured by illegal conduct and predatory lending, and OneWest knew or should have known about IndyMac's reputation as a predatory lender. Plaintiffs also attached a copy of the deed of trust to the SAC, which included the following provision: "The Note or a partial interest in the Note (together with this security Instrument) can be sold one or more times without prior notice to Borrower." Additionally, plaintiffs attached as an exhibit an assignment of deed of trust, noting in the SAC that it was recorded on February 25, 2010. No reference was made in the SAC to the date the assignment was signed. The assignment, entitled corporate assignment of deed of trust, shows the FDIC, acting as receiver for IndyMac, assigned the deed of trust for plaintiffs' home to OneWest on January 21, 2010.[4]

OneWest suggests in a footnote in its appellate briefing that "judicially noticeable documents corroborated that OneWest had an interest in [plaintiffs'] loan. Those documents showed that OneWest purchased certain assets of IndyMac [including the [plaintiffs'] loan] from the [FDIC] pursuant to the *Loan Sale Agreement* By and Between the Federal Deposit Insurance Corporation as Receiver for IndyMac [] and OneWest [], as of March 19, 2009." (Italics added.) The record discloses that the trial court expressly declined to take judicial notice of loan sale agreement. Specifically, in ruling on the demurrer to the SAC, the trial court wrote: "The court declines the request to take judicial notice of, and interpret the effect of the FDIC loan sale agreement in ruling on this demurrer." OneWest does not assert that the trial court erred in declining its request for judicial notice. Moreover, while there are documents in the record on appeal at the pages cited by OneWest that were submitted as part of a request for judicial notice in the trial court, none of the documents referenced in the declaration are among them. In particular, we have not found in the record the loan sale agreement specifically referenced in OneWest's footnote in its appellate briefing. During oral argument, counsel for OneWest acknowledged that it is not in the record. Thus, there is no material of which we can take judicial notice indicating plaintiffs' note was purchased by OneWest on March 19, 2009.

[4] Although neither party called our attention to the actual language of the corporate assignment of deed of trust, our review of the fine print reveals that it reads in pertinent part that the FDIC as a receiver for IndyMac "does convey, grant, sell, assign, transfer and set over the described Deed of Trust *together with the certain note*(s) described therein . . ." to OneWest. (Italics added.) The italicized text suggests that both the deed

OneWest demurred a third time, and the trial court overruled the demurrer. On April 21, 2011, OneWest filed an answer to the SAC. Among the allegations in the answer, OneWest asserted, under the heading "Failure to Do Equity," that plaintiffs' claim was "barred by reason of [p]laintiffs' failure to make an offer to tender the amounts due upon their loan for the subject property."

Motion for Judgment on the Pleadings

On June 9, 2011, OneWest filed a motion for judgment on the pleadings, contending that: (1) plaintiffs failed to exhaust their administrative remedies before filing litigation against OneWest; and (2) OneWest is not liable for the conduct of IndyMac as a successor in interest because plaintiffs failed to plead any viable theory of assignee liability.

On July 13, 2011, the court granted OneWest's motion but permitted plaintiffs to file a third amended complaint, ruling that it was unclear from the SAC whether plaintiffs' theory of OneWest's liability was based on assignee liability or based on OneWest's alleged knowledge of IndyMac's predatory lending practices.

Third Amended Complaint and Demurrer

On July 25, 2011, plaintiffs filed a third amended complaint (TAC), elaborating on their allegations regarding OneWest's alleged knowledge of IndyMac's misconduct and further alleging that OneWest knowingly filed the notice of default before it had a recorded interest in the note and deed of trust. Additionally, plaintiffs alleged that OneWest "did not appear of record" until February 25, 2010. They again attached the January 21, 2010, corporate assignment of deed of trust recorded on February 25, 2010,

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of trust and the note were assigned at the same time. Thus, despite OneWest's assertion discussed in footnote 3, *ante*, we must assume the facts in the complaint and the corporate assignment and deed of trust to be true and conclude for purposes of the demurrer that *both the note and deed of trust* were assigned to OneWest on January 21, 2010.

but this time referenced the specific date of the assignment in the TAC and alleged, based on this document, that "OneWest [] cannot even argue it had an interest at the time of the recording of the Notice of Default or Trustee's Sale because this Corporate Assignment of Deed of Trust is purportedly dated January 21, 2010, several months after the foreclosure had been completed by entities that had no interest in the Note Secured by Deed of Trust which was being foreclosed upon." Plaintiffs further alleged that "nothing of record in California exists at the time of the recording of the Notice of Default to give OneWest [] an interest in the property as a beneficiary."

OneWest again demurred and also moved to strike the portions of the TAC that alleged liability based on OneWest's assignee status, contending that the court already ruled that plaintiffs could not state a claim against OneWest based on its assignee status in its ruling on OneWest's motion for judgment on the pleadings. The court did not reach the motion to strike because it sustained the demurrer in its entirety with leave to amend, ruling that plaintiffs needed to allege tender to obtain equitable relief and ruling that "[i]f there is a good faith doubt as to where plaintiffs should tender the payment, they may deposit the funds with the court." The court specifically granted "leave to amend to allege tender."

Fourth Amended Complaint and Demurrer

On October 27, 2011, plaintiffs filed a fourth amended complaint (FAC). Despite the trial court's directive to plaintiffs to allege tender, the FAC mirrored the TAC, adding only the allegation that plaintiffs "cannot 'tender' to anyone because [IndyMac] no longer exists and [OneWest] foreclosed before it had an interest in the Note or Deed of Trust which occurred in 2010 and the foreclosure in 2009!" The complaint did not explain why plaintiffs should not be required to tender to OneWest, given that OneWest had obtained an interest in the property prior to filing their claim to quiet title.

OneWest again demurred, contending that plaintiffs failed to allege tender. At oral argument on the demurrer, plaintiffs contended that "OneWest hasn't proven it's

entitled to receive tender. Because they haven't admitted or shown by their pleadings that they had any title at the time of foreclosure."

On January 26, 2012, the court sustained the demurrer without leave to amend and dismissed OneWest from the action.

DISCUSSION

I. Quiet Title Claim and Tender

A. Plaintiffs' Contentions

On appeal, plaintiffs now contend that the trial court erred in sustaining OneWest's demurrer without leave to amend because OneWest had no documented interest in the property at the time of the foreclosure and, accordingly, plaintiffs need not allege tender to succeed on their quiet title claim. Plaintiffs contend this defect permits them to quiet title without tendering the balance of their debt. Specifically, plaintiffs contend that "tender is not required where the foreclosure sale is void, rather than voidable, such as when a plaintiff proves that the entity lacked the authority to foreclose on the property."

B. Analysis

1. Standard of Review

"For purposes of reviewing a demurrer, we accept the truth of material facts properly pleaded in the operative complaint, but not contentions, deductions, or conclusions of fact or law. We may also consider matters subject to judicial notice." (*Yvanova v. New Century Mortgage Corp*. (2016) 62 Cal.4th 919, 924 (*Yvanova*).) "We are not concerned with plaintiff's ability to prove the allegations or with any possible difficulties in making such proof." (*Mendoza v. JPMorgan Chase Bank, N.A.* (2016) 6 Cal.App.5th 802, 809 (*Mendoza*).) "Where, as here, the trial court sustains the demurrer without leave to amend, we must decide whether there is a reasonable possibility the plaintiff can cure the defect with an amendment. If we find that an amendment could cure the defect, we must find the court abused its discretion and

reverse. If not, the court has not abused its discretion." (*Ibid*.) It is well settled that on appeal, the plaintiff bears the burden of proving an amendment would cure the defect. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 (*Blank*); *Mendoza*, at p. 809, citing *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081 (*Schifando*).)

With regard to amendments, rules of appellate practice are also at play. New issues cannot be raised for the first time in oral argument. (*New Plumbing Contractors, Inc. v. Nationwide Mutual Ins. Co.* (1992) 7 Cal.App.4th 1088, 1098 (*New Plumbing*) [new causes of action, raised for the first time at oral argument, rejected; "new issues cannot generally be raised for the first time in oral argument"].) Indeed, we generally do not consider arguments made for the first time even in a reply brief, because " '[o]bvious considerations of fairness in argument demand that *the appellant present all of his [or her] points in the opening brief*. To withhold a point until the closing brief would deprive the respondent of his [or her] opportunity to answer it or require the effort and delay of an additional brief by permission. Hence the rule is that points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before.' " (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764 (*Reichardt*), quoting *Neighbours v. Buzz Oates Enterprises* (1990) 217 Cal.App.3d 325, 335, fn. 8 (*Neighbours*), italics added.) Thus, where a plaintiff fails to show how the complaint can be amended in their opening brief, we may properly regard any belated proposed amendments as forfeited. (*Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41, 52, 56 [rejecting points raised for the first time on appeal without good cause in reviewing trial court's ruling sustaining a demurrer without leave to amend].) For similar reasons, where there is a change in the law after briefing has been completed which might provide good cause to make new contentions and the plaintiff has not sought leave to file supplemental briefing to discuss the new law and explain how the complaint can be amended, even though there was ample time to do so, we may also regard an amendment

proposed at oral argument forfeited. (See Cal. Rules of Court, rule 8.200(b) [providing that additional briefing may be allowed with the permission of the presiding justice].)

2. The Tender Rule

In order to obtain equitable remedies after a trustee's sale, including quiet title, generally a plaintiff must allege and prove tender of the full amount of the debt for which the real property served as security. (*Arnolds Management Corp. v. Eischen* (1984) 158 Cal.App.3d 575, 578.) "As a general rule, a plaintiff may not challenge the propriety of a foreclosure on his or her property without offering to repay what he or she borrowed against the property." (*Intengan v. BAC Home Loans Servicing LP* (2013) 214 Cal.App.4th 1047, 1053.)

In each of the five versions of their complaint, plaintiffs failed to allege tender, even after the trial court specifically directed them to do so. The court ruled that "[i]f there is a good faith doubt as to where plaintiffs should tender the payment, they may deposit the funds with the court."[5]

Plaintiffs do not dispute that they failed to allege tender but claim that they are not required to tender. Their theories have evolved in the course of appellate briefing. In their opening brief, without citation to authority, plaintiffs stated: "[Plaintiffs] believe the failure of [OneWest] to comply with California's Recording Statutes and due process voids the transfer of the property to OneWest[]."[6] (Plaintiffs also acknowledged in their

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[5] The trial court did not cite authority for this option, and at oral argument, the parties indicated they were aware of none, although OneWest's counsel noted that he had seen it done in practice. (Oral Argument Recording 9:56:60) (But see 5 Miller & Starr, Cal. Real Estate (4th ed. 2018) Reinstatement—Method of reinstatement, § 13:232 [discussing the effects of a valid tender and explaining that "a deposit of a sum into a bank *or with the court* for the benefit of the beneficiary to bring the loan current stops the beneficiary from exercising any loan acceleration option"].)

[6] Plaintiffs provided no legal analysis to support this contention in their opening brief. As OneWest points out, there is no requirement in California's comprehensive

opening brief that "the property is gone," and asserted that "there should be no issue of tender in this case, since [plaintiffs] have lost their ability to seek injunctive relief."

In their reply brief, plaintiffs relied on *Glaski v. Bank of America* (2013) 218 Cal.App.4th 1079 (*Glaski*), to support their contention that they need not tender. *Glaski* was decided after plaintiffs filed their opening brief and OneWest filed its respondent's brief. In *Glaski*, the court concluded that the foreclosing bank "was *not the true owner* of the loan because its chain of ownership had been broken by a defective transfer of the loan to the securitized trust established for the mortgage-backed securities." (*Id*. at p. 1082, italics added.) The *Glaski* court reasoned that, because the transfer of the loan to a securitized trust, which was formed under New York law, occurred after the trust's closing date, the transfer violated the terms of the trust instrument and was void under New York law. (*Id.* at p. 1083.) The court further wrote: "[t]ender is not required where the foreclosure sale is void, rather than voidable, such as when a plaintiff proves that the entity lacked the authority to foreclose on the property. [Citations.] Accordingly, we cannot uphold the demurrer to the wrongful foreclosure claim based on the absence of an allegation that Glaski tendered the amount due under his loan." (*Id.* at p. 1100, citing *Lester v. J.P. Morgan Chase Bank* (N.D.Cal. 2013) 926 F.Supp.2d 1081, 1093; 4 Miller & Starr, Cal. Real Estate (3d ed. 2003) Deeds of Trust, § 10:212, p. 686.)

Plaintiffs urged us to follow *Glaski*, contending that it supports their argument that they may quiet title *without* alleging tender based on their allegation that the foreclosing

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nonjudicial foreclosure scheme requiring a successor beneficiary to record an assignment of a note or deed of trust before initiating foreclosure proceedings. (*Kan v. Guild Mortgage Co.* (2014) 230 Cal.App.4th 736, 744, fn. 2; *Calvo v. HSBC Bank U.S.A.*, N.A., (2011) 199 Cal.App.4th 118, 123 [citing federal cases holding that there is no requirement under California law that an assignment be recorded for an assignee beneficiary to foreclose, and recordation of an assignment of a beneficial interest for a deed of trust is not required for a successor beneficiary to foreclose].)

entity lacked a documented interest in the deed of trust at the time of the foreclosure and the trustee sale was therefore void. In other words, plaintiffs shifted theories for why tender was not required from their claims in their opening brief that the foreclosure sale was void because OneWest purportedly did not comply with unspecified recording statutes and because injunctive relief was not possible, to a claim that operative complaint established that OneWest was not the true owner of the loan at the time of the foreclosure. As plaintiffs put it in their reply brief, "the failure of OneWest [] or Quality Loan . . . to have any interest, recorded or otherwise, at the time the Notice of Default, Notice of Trustee's Sale and Trustee's Deed were executed renders the Trustee's Deed void."

Many cases have been critical of *Glaski* on its conclusion that the transfer of the loan into a securitized trust after the trust closed was void rather than voidable. (See *Mendoza*, *supra*, 6 Cal.App.5th at pp. 811-814.) Nevertheless, there are exceptions to the tender rule and one of them may be when the trustee's deed is void on its face. (*Sciarratta v. U.S. Bank National Assoc.* (2016) 247 Cal.App.4th 552 (*Sciarratta*) [following *Glaski*, tender is not required to state a cause of action for quiet title or for cancellation of instruments when the plaintiff properly alleges the assignment was void and not merely voidable]; *Ram v. OneWest Bank, FSB* (2015) 234 Cal.App.4th 1, 19 [agreeing with *Glaski* that when a plaintiff proves the foreclosure sale is void, rather than voidable, such as when the plaintiff proves that the entity lacked the authority to foreclose on the property, no tender is required]; *Lona v. Citibank, N.A*, (2011) 202 Cal.App.4th 89, 113 (*Lona*) [borrower is not required to rely on equity when the trustee's deed is void on its face and thus borrower is not required to tender].) As we shall discuss, the unique facts presented in the operative complaint and judicially noticeable materials in the instant case support the trial court's ruling requiring that tender be pleaded.

At oral argument, plaintiffs relied on, *Yvanova*, *supra*, 62 Cal.4th 919, (OA Recording 9:34;34) and *Sciarratta*, *supra*, 247 Cal.App.4th 552, (OA Recording 9:36:55)

both published after briefing was completed in this case but well before oral argument.[7] Counsel for plaintiffs argued that both cases were factually the same as the instant case. We disagree. Both cases are distinguishable from the instant case on factual and procedural grounds.

In *Yvanova*, our high court held that an allegation in a complaint that the *assignment was void*, and not merely voidable at the behest of the parties to the assignment, will support an action for *wrongful foreclosure* and that a borrower under such circumstances has standing to sue for *wrongful foreclosure*. (*Yvanova, supra,* 62 Cal.4th at pp. 923-924.) The plaintiff in *Yvanova* had executed a deed of trust securing a note on residential property. The lender and beneficiary of the deed of trust was New Century Mortgage Corporation (New Century). (*Id*. at p. 924.) New Century filed for bankruptcy the following year and a little more than a year later its assets were transferred to a liquidation trust. (*Ibid*.) According to the operative complaint, New Century purported to execute an assignment of the deed of trust to Deutsche Bank National Trust (Deutsche Bank) as trustee for the registered holder, the Morgan Stanley investment trust, more than four years after New Century's assets had been liquidated. (*Id*. at pp. 924-925.) A year later, Western Progressive, LLC (Western Progressive), recorded a document substituting itself for Deutsche Bank as trustee. Around the same time, a notice of trustee's sale was recorded by Western Progressive, and the plaintiff's residence was thereafter sold at a trustee's sale. The *Yvanova* court held "a wrongful foreclosure plaintiff has standing to claim the foreclosing entity's purported authority to

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[7] At no time did plaintiff seek to file supplemental briefing discussing these cases or potential amendments to the FAC. A month prior to oral argument, in response to a request by the court for an update on new authority upon which the parties might rely, plaintiffs listed both *Yvanova, supra,* 62 Cal.4th 919, and *Sciarratta, supra,* 247 Cal.App.4th 552, among other cases in letters to the court. (Plaintiff's letter of February 12, 2019.)

order a trustee's sale was based on a void assignment of the note and deed of trust." (*Id*. at p. 939.)

Our case is factually and procedurally different from *Yvanova*. In that case, there was a purported assignment involving a bankrupted entity that could not have made an assignment, and thus, the assignment was void. Here, there was no void assignment. The claim here relates to the timing of the assignment. Consequently, we are not faced with a situation where the foreclosing entity never obtained a valid assignment. Rather, the operative complaint establishes that the foreclosing entity obtained an assignment of the deed of trust a little more than a month after the foreclosure sale and four months before plaintiffs filed their original complaint in this case. Thus, while the trustee deed may have been void on its face, the later assignment was not. The circumstances presented in the instant case are more akin to a voidable assignment where, as the *Yvanova* court noted, ratification or validation by the parties to the assignment is available so that a plaintiff would not have a claim based on that assignment. (*Yvanova, supra*, 62 Cal.4th at p. 936 ["Unlike a voidable transaction, a void one cannot be ratified or validated by the parties to it even if they so desire"].) Here, according to the FAC, the foreclosing entity, OneWest, is alleged to not have had a beneficial interest at the time of foreclosure. However, shortly after the foreclosure, and before this action was filed, OneWest was assigned a beneficial interest from the entity that had the beneficial interest at the time of the foreclosure, FDIC. Plaintiffs have no claim based on the validity of that assignment.

Additionally, the instant case involves a claim to quiet title, not for wrongful foreclosure as in *Yvanova*. In the FAC, plaintiffs sought to "quiet title as of the date of filling the original [c]omplaint," which was May 10, 2010, almost four months after plaintiffs' note and deed of trust was assigned to OneWest. Specifically, plaintiffs seek in the FAC to have "the deed of trust extinguished with the property being restored in [p]laintiffs' name." The trial court ruled that plaintiffs were required to allege tender to state a cause of action to quiet title. The *Yvanova* court expressly did not decide whether

the plaintiffs were required to allege tender, even in the situation where there had been a void assignment. While the court observed that "tender has been excused when, among other circumstances, the plaintiff alleges the foreclosure deed is facially void, as arguably is the case when the entity that initiated the sale lacked authority to do so," the court noted that its review was "limited to the standing question" and stated "we express no opinion as to whether plaintiff Yvanova must allege tender to state a cause of action for wrongful foreclosure under the circumstances of this case." (*Yvanova, supra*, 62 Cal.4th at p. 929, fn. 4.) *Yvanova* is not nearly as helpful as plaintiffs suggest.

In *Sciarratta,* the plaintiff borrower alleged claims for wrongful foreclosure, quiet title and cancellation of instruments. (*Sciarratta, supra*, 247 Cal.App.4th at pp. 558, 559.) Similar to *Yvanova*, the plaintiff alleged that, as a result of a void assignment, the entity that foreclosed had no beneficial interest in the subject property. (*Sciarratta*, at pp. 558, 559.)

As the *Sciarratta* court noted, the underlying facts in that case were "convoluted." (*Sciarratta, supra*, 247 Cal.App.4th at p. 556.) Plaintiff obtained a loan secured by her residence and executed a promissory note secured by a deed of trust identifying Washington Mutual Bank, F.A. (WaMu) as the lender and California Reconveyance Company (CRC) as the trustee. (*Id*. at pp. 556-557.) JPMorgan Chase Bank, N.A. (Chase), as successor in interest to WaMu, assigned plaintiff's deed of trust and promissory note to Deutsche Bank National Trust Company (Deutsche Bank), which was recorded on April 27, 2009. (*Id*. at p. 557.) On that same day CRC recorded a "Notice of Default," and, in July 2009, recorded a notice of trustee's sale. (*Ibid*.) However, on November 9, 2009, Chase recorded an assignment to Bank of America, National Association (Bank of America), despite having assigned the note and deed of trust to Deutsche Bank in April 2009. (*Ibid*.) Also on November 9, 2009, CRC recorded a trustee's deed of sale on behalf of Bank of America as the foreclosing beneficiary on the deed of trust. (*Id*. at p. 558.) On December 28, 2009, Chase recorded a purported

assignment to Bank of America which stated, "This assignment is being recorded to correct the assignee reflected on the assignment recorded April 27, 2009."[8] (*Ibid*.) Having made an assignment to Deutsche Bank in April, Chase had nothing to assign when it purported to assign the note and deed of trust to Bank of America in November. (*Id.* at p. 564.) Therefore, Deutsche Bank, not Bank of America, was the owner of the *Sciarratta* plaintiff's loan at the time of the trustee's sale. (*Id.* at p. 556.) In reversing the trial court's dismissal after sustaining a demurrer without leave to amend, the *Sciarratta* court held that a borrower who has been foreclosed upon by an entity purporting to exercise rights under a void assignment suffers prejudice sufficient to satisfy the prejudice element of wrongful foreclosure. (*Id*. at pp. 561-567.)

Regarding the quiet title and cancellation of instruments claims, the *Sciarratta* court held that tender was not required because the plaintiff properly alleged that the foreclosure was void and not merely voidable. (*Sciarratta, supra*, 247 Cal.App.4th at pp. 557-568.) But *Sciarratta* is factually distinguishable from the instant case because, here, according to the FAC, the entity that foreclosed in a purported void trustee's sale was later assigned plaintiffs' note and deed of trust. Thus, months before plaintiffs filed this action, OneWest had obtained the beneficial interest in the property and had the authority to foreclose based on the facts alleged in the FAC. Unlike in *Yvanova* and *Sciarratta*, OneWest was not a stranger to the debt; plaintiffs acknowledge OneWest did eventually obtain an interest from the FDIC by the assignment of the deed of trust.

Nevertheless, plaintiffs essentially requested the court to quiet title without repaying their debt. Because the action is in equity, a defaulted borrower is required to do equity before the court will exercise its equitable powers; thus, the borrower must

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[8] There is nothing in the *Sciarratta* opinion indicating that Deutsche Bank consented to this belated transfer to Bank of America or that it ever renounced the interest it had obtained in the April 27, 2009, assignment.

tender the amount owed. (See *Lona v Citibank, N.A.* (*supra)*, 202 Cal.App.4th at p. 112 [because an action to set aside a trustee's sale is an action in equity, the borrower is required to do equity before the court will exercise its equitable powers].)

Unlike reinstatement, a cause of action to quiet title does not simply seek to cure a default prior to sale; it seeks a judicial determination that plaintiffs hold title in the property. This distinction is illustrated in *Lueras v. BAC Home Loans Servicing, LP* (2013) 221 Cal.App.4th 49 (*Lueras*). In *Lueras*, as here, the plaintiff sought to quiet title to his home after it was sold at a foreclosure sale. (*Id*. at p. 55.) Like plaintiffs here, the plaintiff in *Lueras* did not offer to tender the full amount of his indebtedness. (*Id.* at pp. 86-87.) Instead, he argued that tender of the full indebtedness was "not required to quiet title because (1) making payments under the Forbearance Agreement constituted a tender of the debt, and (2) tender would not have been required to halt or set aside a foreclosure sale." (*Id.* at p. 86.) The *Lueras* court rejected both arguments, holding that the plaintiff needed to tender the full amount of his outstanding debt to quiet title in his home. (*Id*. at pp. 86-87.) Similarly, in this case, because OneWest obtained a valid assignment of plaintiffs' note and deed of trust before plaintiffs filed this action, plaintiffs may not quiet title against OneWest without first paying their entire outstanding debt. (See *id.* at p. 86; see also *Miller v. Provost* (1994) 26 Cal.App.4th 1703, 1707 (*Miller*) ["mortgagor of real property cannot, without paying his debt, quiet his title against the mortgagee"]; *Aguilar v. Bocci* (1974) 39 Cal.App.3d 475, 477 [borrower cannot quiet title without discharging the debt].) "The cloud on title remains until the debt is paid." (*Lueras*, at p. 86.) Allowing plaintiffs to claim the property without paying anything "would give them an inequitable windfall, allowing them to evade their lawful debt" (see *Stebley v. Litton Loan Servicing, LLP* (2011) 202 Cal.App.4th 522, 526) and take title to the property free and clear of the debt. Such an inequitable result would be inconsistent with an equitable cause of action to quiet title.

Finally, to the extent that plaintiffs rely on OneWest's alleged wrongdoings to challenge the underlying debt and/or bolster their claim to title to the property, such reliance is misplaced. (AOB 13-16; 3 CT 569-73) A party seeking to quiet title "is not helped by the weaknesses of his adversary's title but must stand upon the strength of his or her own." (*Shimpones v. Stickney* (1934) 219 Cal. 637, 649.) Equity requires that the debt be paid. (*Miller, supra*, 26 Cal.App.4th at p. 1707 [recognizing the equitable principle that "a mortgagor of real property cannot, without paying his debt, quiet his title against the mortgagee"].)

In sum, we agree with the trial court that plaintiffs' failure to make tender is fatal to this cause of action.

3. Leave to Amend

During rebuttal at oral argument, counsel for plaintiff suggested for the first time that plaintiffs could allege a claim of wrongful foreclosure. (Oral Argument Recording 10:01:32) As noted *ante*, we must reverse if "there is a reasonable possibility the plaintiff could cure the defect with an amendment." (*Schifando, supra*, 31 Cal.4th at p. 1081.) But it is well-settled that the plaintiff bears the burden of proving an amendment would cure the defect. (*Blank, supra*, 39 Cal.3d at p. 318; *Mendoza, supra*, 6 Cal.App.5th at p. 809; *Schifando*, at p. 1081.) Plaintiffs did not submit a request to file supplemental briefing relying on new case law and asserting facts establishing how the complaint could be amended to state a cause of action for wrongful foreclosure, even though there was ample time to do so. Withholding a point until oral argument rebuttal after never having briefed or argued it deprives the respondent of an opportunity to answer the argument. (See *Reichardt, supra*, 52 Cal.App.4th at p. 764; *New Plumbing Contractors, supra*, 7 Cal.App.4th at p. 1098; *Neighbours, supra*, 217 Cal.App.3d at p. 335, fn. 8.)

Moreover, plaintiffs never asserted, even at oral argument, how they intended to amend their complaint to establish a cause of action for wrongful foreclosure. For example, plaintiffs have not shown how they would establish prejudice. In addition to

tender, prejudice is an element of wrongful foreclosure. (*Sciarratta*, *supra*, 247 Cal.App.4th at pp. 561-562.) The instant case, as we have noted, is different from *Sciarratta*, where the court of appeal concluded a plaintiff could show prejudice essentially based solely on the trustee sale having been initiated by an entity that was not authorized to do so. (*Sciarratta*, at pp. 561-567.) As far as can be discerned from the *Sciarratta* opinion, the foreclosing entity in that case was never validly assigned an interest in the subject note and deed of trust. Here, OneWest was validly assigned the beneficial interest, and thus more must be established to show prejudice because, even if plaintiffs were entitled to cancellation of the trustee's sale for property they acknowledge in their appellate briefing is "gone," they have not shown why they do not owe OneWest on their loan. Additionally, as we have already explained, since OneWest obtained a beneficial interest in the subject property before plaintiffs filed this action, plaintiffs must allege tender. Thus, it does not appear that plaintiffs can show prejudice, and in any event, they have failed to indicate how they could.

DISPOSITION

The judgment is affirmed. Plaintiffs shall pay defendant OneWest's costs on appeal. (See Cal. Rules of Court, rule 8.278(a)(1) & (5).)

/s/
MURRAY, J.

We concur:

/s/
RAYE, P. J.

/s/
BUTZ, J.